

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 30 1940

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

CLERK

No. 7657.

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

BRIEF IN SUPPORT OF THE APPELLANT'S PETITION FOR A STAY ORDER.

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October 30, 1940.

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BRIEF IN SUPPORT OF THE APPELLANT'S PETITION FOR A STAY ORDER.

PRELIMINARY.

This appeal seeks reversal of an order of the Federal Communications Commission which, by a construction permit, authorizes the operation of a radiobroadcast station at Columbus, Ohio, with the same frequency used by the radiobroadcast station of the appellant at Cincinnati, Ohio.

The verified notice of appeal, and particularly those portions which are restated or embodied in the peti-

tion for stay order, sets out in detail and with particularity the substantial electrical interference which will result to the service of the appellant's station. It is shown by the Commission's own regulations (Standards of Good Engineering Practice) that such interference is to be anticipated.

In the present state of the pleadings the appellant's allegations in this regard are to be taken as true. It is to be assumed that destructive interference will take place within a substantial portion of the appellant's service area.

With the notice of appeal, the appellant on April 11, 1940, served upon the Commission and filed with the Court its petition for an order staying the effectiveness of the Commission's authorization pending the disposition of this appeal.

No later than one day following the receipt of this petition the Commission hastened to mail out to the Columbus station the construction permit in controversy.

The Commission then filed an opposition to the petition for stay order whereby in an unverified recital it contradicted some of the appellant's statements but admitted from its standpoint that there would be a loss of 20,800 potential listeners within the WCPO primary service area.

The opposition then went on to object to the issuance of a stay order, saying that the Court is without power to issue the order, that there is no specific provision therefor in the statute, that the general judicial powers of the Court are not invoked upon administrative appeals, that the requested stay would be the exercise of an "executive" function committed to the Commission, that the stay would in effect be a revocation

of the Columbus construction permit so hastily mailed out and that the granting of the stay would be an adjudication of the legal rights of the Columbus station which is not a party to these proceedings.

These arguments are not novel.

The power of the court.

When courts have announced controlling principles of law or have given a construction to statutes upon which general reliance has been placed, they ought not, after those principles have been promulgated and after these constructions have been published, to withdraw or overrule them. It is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration and parties should not be encouraged to seek reexamination of determined principles and to speculate on a fluctuation of the law with every change in the expounders of it.

Among the reported decisions of the Court of Appeals, the first involving the issuance of a stay order was *General Electric Company v. Federal Radio Commission*, 58 App. D. C. 386, 31 F. (2d) 630. There the order of stay was issued upon oral request and pursuant to oral argument. Thereafter the Court denied a motion of the Federal Radio Commission to vacate the stay order, which motion was grounded upon the Commission's claim that the Court was in effect granting a license and usurping the Commission's functions (See pages 370-372 of the printed record in No. 4870). However the detailed presentation of the arguments of the parties is not at hand.

In *Intercity Radio Telegraph Company, et al. v. Federal Radio Commission*, the disposition of which is reported at 60 App. D. C. 21, 46 F. (2d) 602, the entire

question of the Court's power to issue an order of stay was raised by the Commission.

On July 1, 1929, the Federal Radio Commission filed a detailed answer to a petition for a stay order wherein it was set up, under the heading "Motion to Dismiss Petition for Stay Order", that no authority is conferred upon the Court by the Radio Act of 1927 or any other law to issue the stay, that the petition for stay is in effect a petition for a writ of supersedeas, that the stay order if granted would settle the right of parties who had not been and who could not be impleaded as parties (See printed record in No. 4987, pages 25, 33-35).

This motion was supported by an elaborate brief based upon substantial research and citing a number of cases. This brief contended that there was no property right in any license which might be subject to injunctive protection, that Section 11 of the Act creating the Court of Appeals, which section gave the court power to issue all necessary and proper remedial prerogative writs in aid of the appellate jurisdiction, was not applicable, etc. (see *idem*, pages 36 ff.).

In considering the above statement that the brief was thorough and exhaustive, the Court may wish to make some allowances for the fact that counsel for the present appellant was author of that brief as then counsel for the Federal Radio Commission.

The views of counsel, however, did not prevail. Upon full consideration of the motions, the brief and the answer brief, the Court entered its order granting stays as requested.

Sight is not lost of the fact that at that time the Court of Appeals was not sitting in a judicial capacity but, until July 1, 1930, sat as a superior and revisory authority in the same field.

In this regard, as elaborately set out in the opinion of Judge Hincks in *General Broadcasting System v. Bridgeport Broadcasting Station* (D. C., Conn. 1931), 53 F. (2d) 664, the Court of Appeals must certainly be understood to have more authority by way of issuance of stay orders as a judicial tribunal than as an administrative court.

For some short time thereafter the Commission continued to test the power of the Court of Appeals to issue stay orders. The conduct of the Commission and of the Court were called to the attention of Congress. In the Third Annual Report of the Commission, filed in November 1929, the Commission called to the attention of Congress the issuance of the order to stay execution of the Commission's decision in the *General Electric* case (Report, page 72). The Commission also discussed the *Intercity* case and pointed out to Congress that a petition for stay order had been filed in that case in reliance upon the decision of the Court in the *General Electric* case. The Commission reported that it had filed motions to dismiss the petition upon the theory that the Court of Appeals was without jurisdiction to issue a stay order (*idem.*, p. 77).

In the Fourth Annual report, filed in December 1930, the Commission called it to the attention of Congress that in the Connecticut controversy, reference to which has just been given, the question was pending whether the Court of Appeals of the District of Columbia had power to issue a stay order (p. 47).

These questions of power were completely resolved by the Court of Appeals. In a long series of cases such stay orders were issued. It should not be necessary here to repeat the statistical analysis furnished the Court by distinguished counsel for The Crosley Corporation in his brief in support of the petition for sup-

plementary relief during the pendency of *The Crosley Corporation v. Federal Communications Commission*, No. 7351, filed in April 1939, where both in the text of the brief and in an elaborate appendix the applicable orders of the Court are studied and collected.

It is entirely certain that after the *Intercity* case and until quite recently it has not been doubted by the Court, by appellants or by the Commission that under the general judicial powers of the Court the power to issue a stay order exists.

Indeed, in the very *Crosley* case to which reference has just been made, counsel for the Commission in the brief filed in opposition to the petition of the appellant stated:

“At the outset the Commission desires to make its position clear with respect to its Opposition to appellant’s Petition for Stay Order. The Commission has not opposed in the past, and does not propose in the future to oppose the granting of a stay or such interlocutory restraining order by this Court as may be necessary to protect the appellate jurisdiction of the court or preserve the status quo pending determination of an appeal from an order of the Commission, in any case where such a stay or restraining order appears reasonably to be necessary or advisable. In most cases, the Commission has by stipulation done away with any need for a stay or restraining order and it will continue to do so in any case where it appears to be the proper course.”

In *Trinity Methodist Church South v. Federal Radio Radio Commission*, the appellant petitioned the United States Supreme Court for a writ of certiorari addressed to the discretionary refusal by the Court of Appeals to issue a preliminary stay order. In the brief for the Commission in opposition, the power of the

Court to issue such order was conceded and the brief addressed itself to other considerations (No. 559, Oct. Term, 1931).

The organic act creating and establishing the jurisdiction of the Court of Appeals, provides that it "shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction" (Feb. 9, 1893, 27 Stat. 436, c. 74, sec. 11; Mar. 3, 1901, 31 Stat. 1227, c. 854, sec. 230).

Viewed as a Circuit Court of Appeals of the United States (*e. g.*, *Federal Trade Commission v. Klesner*, 274 U. S. 145, 150-158), the Court has even wider powers, including those "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of . . . (its) jurisdiction(s), and agreeable to the usages and principles of law." (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

Under these general powers of the Court, the practice of issuing stay orders became so firmly established, that Moncure Burke, Esq., formerly Clerk of the Court and author of *Notes on Practice of the Court of Appeals of the District of Columbia*, in the Supplement to the Second Edition of those Notes, published August 15, 1931, set up a form of petition for such stay order (page 11). He said:

"In the absence from the statute and rules of a proviso for supersedeas, the practice has grown up of applying to the Court of Appeals for a stay pending the determination of the appeal in cases where counsel consider irreparable injury might follow an immediate execution of the Commission's decision. The application is filed after the filing of the notice of appeal or concurrent therewith.

"The Court is clothed with remedial power in aid of its appellate jurisdiction (see Burke's Notes, page 17) and stays have been allowed in a

number of cases where they appeared necessary to protect appellate rights."

It may be of some significance that with the exception of the *Pottsville* case, every case going to the United States Supreme Court, namely the *General Electric* case, *Nelson Brothers Bond and Mortgage Company*, *Heitmeyer* and *Sanders Brothers*, stay orders had been issued by this Court.

As heretofore pointed out, the Annual Reports of the Commission called the attention of Congress to the rulings of this Court.

The matter was also before Congress with regard to specific legislation.

There is a certain individuality in the stay orders of the Court heretofore entered in that they have all been issued without hearing (and without any requirement for a verified showing) and without the giving of bond or security.

These were matters that were commented upon by Judge Hincks in the *Bridgeport* cases, *supra*. In 1932 and 1933 Congress had this matter before it in the enactment of H. R. 7716, A Bill to Amend the Radio Act of 1927. Section 10 of that bill struck out the appellate provisions of the Radio Act of 1927 and set up a more detailed procedure. By paragraph (f) of that section, as finally passed, it was provided:

"The court may, . . . upon notice to the commission and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying action of the commission under the order appealed from, in whole or in part, upon the giving of a bond by the party applying for the stay in such amount and with terms and conditions as the court may deem proper. Pending a hearing upon the application for stay, the court may enter a

temporary stay for a period of not to exceed fifteen days."

Even in discussions on the floor of the House over H. R. 7716, it was stated by the Chairman of the House Committee that under existing procedure it was possible to obtain suspension by the Court of the effect of the Commission's order (75 Cong. Record 3682).

H. R. 7716 did not become law because it was not signed by the President, but its history in the foregoing respects is important from two standpoints. First, it indicates the extent to which this matter was before Congress prior to the subsequent reenactment of the appellate provisions of the Radio Act when the Communications Act was passed in 1934. Second, it indicates a desire at the time the matter was before Congress in 1933 to restrict the power of the Court of Appeals in the issuance of these stay orders by requiring a preliminary hearing and the filing of security.

As regards other administrative tribunals there has been specific language definitely intended to limit the power of the Court in the premises. For example, in a number of instances provision has been made by statute that the mere commencement of appellate proceedings shall not, unless specifically ordered by the Court, operate as a stay of the order of the board. Eg. Securities Act of 1933, 15 U. S. C. A. § 77 (i); Natural Gas Act, 15 U. S. C. A. § 717(r); Bituminous Coal Act of 1937, 15 U. S. C. A. § 836 (b); Federal Power Act, 16 U. S. C. A. § 825 (l); Federal Alcohol Administration Act, 27 U. S. C. A. § 204 (h); Fair Labor Standards Act, 29 U. S. C. A. § 210 (b); Civil Aeronautics Act of 1938, 49 U. S. C. A. § 646 (d).

The reenactment in 1934 of the appellate provisions of the Radio Act of 1927 against this background* gives rise to a strong presumption that Congress approved the exercise of the Court's judicial powers theretofore prevailing. *Kepner v. U. S.*, 195 U. S. 100, 124, 49 L. ed. 114, 122; *Heald v. District of Columbia*, 254 U. S. 20, 22-23, 65 L. ed. 106, 111; *Hecht v. Malley*, 265 U. S. 144, 68 L. ed. 949.

Even without the reenactment, the uniform interpretation by the Court and all parties interested over a period of ten years is entitled to some weight (c. f. *Emergency Fleet Corporation v. Western Union Telegraph Company*, 275 U. S. 415).

In the Commission's opposition to the petition for stay order it is suggested that there may be something in the *Pottsville* case (*Federal Communications Commission v. Pottsville Broadcasting Co.*, 84 L. Ed. 361) having the effect of denying the Court's power to issue a stay order as now requested. On the contrary, the *Pottsville* case affirms completely the full right of the Court of Appeals to review a decision of the Federal Communications Commission for error of law and recognizes the full efficacy of the provisions of section 402 (e) of the Act that the Court has power to enter an order reversing a decision of the Commission and to remand the case to the Commission *to carry out the judgment of the court*. The *Pottsville* case denies to the Court the power to issue any mandate instructing the Commission how it is to effectuate the Court's ruling on points of law or the legislative policy of the Communications Act.

*In the Conference Report on the Communications Act of 1934 the conferees reported to the Congress that the text of H. R. 7716 was taken into consideration in the preparation of the Communications Act of 1934 and that some of the provisions of H. R. 7716 were and some of the provisions of it were not used. (73d Congress, 2d Session, House of Representatives Report No. 1918, page 47.)

In the present case the contention of the notice of appeal is invalidity of the action of the Commission in granting an application bound to cause interference with the service of the appellant when accomplished without hearing and on rejection of the appellant's petition for hearing. Such action is illegal and beyond the authority of the Commission. If the Court reverses the Commission, the Court will hold that the action taken was illegal. Under the statute and the *Pottsville* case, the mandate of the Court will have the effect of directing the Commission that it is not to grant the application of the Columbus station without a hearing. This will not be a supervision of administrative proceedings; the Court will not direct the time, place, order, or manner of hearing, but will merely require a fair hearing in accordance with law. The objective sought by the reversal is the objective sought by the stay, except for the necessary difference between a final and interlocutory order. Hence, the power of the Court to issue the stay is essential to preserve the *status quo* in a matter of law confided to the jurisdiction of this Court, concerning which the Court has full authority and wherein the maintenance of the *status quo* is necessary in order to give effectiveness to the requested final decision of the Court in the premises.

The proceedings before this Court on appeal from the Federal Communications Commission constitute a judicial review of administrative action. The proceeding is called an appeal. Certain analogous proceedings with reference to other tribunals are called proceedings to stay the enforcement of orders. Congress has made it clear that it provides a judicial review. We submit that whether that review is in the traditional sense appellate or original is not determinative of the Court's power to issue a stay order.

If the use of the word "appeal" in the statute by Congress is to be given any significance whatsoever it certainly is to be effective to the extent that it imports into these proceedings the established appellate powers of the Court.

On the other hand, if one were to pursue the analogy suggested by Mr. Justice Miller in *Red River Broadcasting Co. v. Federal Communications Commission*, 69 App. D. C. 1, 3, 98 F. (2d) 282 that the proceeding is similar in nature to an equitable proceeding to restrain the enforcement of an invalid order, then even more clearly is the principal applicable that the Court has the power *pendente lite* to preserve that upon which it is proposed that the Court should act.

The sufficiency of the grounds alleged by the appellant.

The appellant is licensee of a broadcasting station rendering an admitted service. It will be injured by any reduction of its service. The Commission proposes to place another station upon its frequency under circumstances that will greatly reduce and substantially restrict the appellant's coverage. First, the Commission granted this without a hearing. Then, the appellant filed a petition for hearing and served this upon the applicant. The question before the Commission was simply whether or not the appellant was entitled to a hearing. The applicant filed a detailed evidentiary statement under oath with the Commission, going not to the question whether or not a hearing should be held, but alleging a conglomerate of fact and opinion. The point seemed to be that no hearing should be held because if a hearing were held and if the Commission accepted the applicant's facts, then the Commission would find that although some interference would take place with the appellant, it would not be very much interference.

Upon inspection of this document, which clearly did not go to the question then before the Commission, namely, the appellant's right to hearing, the appellant very properly moved to strike this document. The Commission declined to act on the motion to strike (until final decision), accorded the appellant no opportunity to rebut the *ex-parte* "evidence," chastised the appellant for being unwilling to launch into the trial of the case through a series of counter-allegations, cross-affidavits and other correspondence, denied the appellant any right to a hearing and reaffirmed its grant.

What the Commission did was to overrule the decision of this Court in *Journal Company v. Federal Radio Commission*,* 60 App. D. C. 92, hold that the *Journal Company Case* was no longer law, that it could grant any application which proposed to cause interference to the appellant without any hearing whatsoever and on the basis of documents contained in its file, which it refused the appellant an opportunity to test by cross-examination or rebuttal. In this somewhat unusual state of affairs, the appellant sued out its notice of appeal. The fifty pages of allegations in the notice of appeal, which are referred to in the petition for stay order, are, of course, for present purposes to be taken as true and they stand admitted. Some point is made in the opposition to the petition for stay order of the failure of the appellant to plead its detailed evidence, as for example, the exact advertisers which the appellant would lose and the exact amount of financial injury which it would suffer through the effectuation of the Commission's decision.

*Reaffirmed in *Woodmen, etc., v. F. C. C.*, 70 App. D. C. 196, and *Ward v. F. C. C.*, 108 F. (2d) 486.

Paragraph 9 of the petition for stay order states generally the character of the expected interference to the service area of the petitioner.

Paragraph 10 makes specific reference to the portions of the appellant's petition for hearing before the Commission wherein are recited the details and the bases for the expectations of interference and reference is made to the verification of these details by affidavit in that petition for hearing.

The opposition to the petition for stay order is in effect a motion to dismiss that petition, or a demurrer thereto. The extensive and detailed demonstration of destructive interference contained therein, both in text and by reference, are for the purposes of the present proceedings, true and correct.

The applicant at Columbus has for years operated upon its present frequency and it will not be inconvenienced by the temporary postponement of its requested advance in coverage at the appellant's expense, pending such a fair hearing to the appellant as is required by law. The appellant, on the other hand, is confronted with the destruction of a big portion of its service area and the loss of its listeners pending the Court's decision herein.

The balance of convenience is clear. If the stay order is issued the appellant will render service to its present audience and the Columbus station will merely be prevented from gaining an audience which it does not now have.

In view of the clear illegality of any action of the Commission which undertakes, so far as we know, for the first time in the administration of the Communications Act of 1934, to destroy one station's coverage for the benefit of another without a hearing, the stay order should issue.

Since the stay is directed at the very action sought to be reversed and since the stay is of the effectiveness of new construction, the present request is distinguishable from certain other petitions for stay which have been heretofore opposed upon the grounds that the stay order would in effect be the granting of a license by the Court. (Cf. *The Crosley Company v. Federal Communications Commission*, *supra*.)

It is to be noted that the present appeal was sued out and the petition for stay was filed on April 11, 1940, and served upon the Commission that day. From footnote 2 at page 3 of the opposition it appears that on the following day, April 12th, the Commission diligently mailed out the construction permit in question. We doubt that this attempt to circumvent the appellate jurisdiction of the Court is in any sense valid but it may well be that a stay order issued herein should specifically recite the invalidity of the Commission's action and should require the Commission to recall the construction permit. *Goldsmith v. Valentine*, 35 App. D. C. 299.

The licensee of the Columbus station, if not present in these proceedings, is absent by its own choice. The statute makes provision for formal notification to that licensee by the Commission that the appeal has been taken and the statute accords that licensee full opportunity to intervene and participate in these proceedings.

The contention that the licensee of the Columbus station is an indispensable party, is a contention that after an appeal has been filed, the Commission may by the brazen act of mailing out the construction permit in contest, oust the Court of Appeals from any right to review the validity of that construction permit.

No such result could conceivably have been intended by a statute which gives the licensee of the Columbus

station no rights except the rights conferred by the Commission itself, a party to this proceeding, the validity of whose action is directly in contest.

The argument that the Columbus station would be adversely affected without hearing should the stay order be granted does not come in good consistency from the Commission. As now authorized the Columbus station delivers programs to an audience. It is contended by the Commission that under the construction permit, the station may deliver programs to a somewhat larger audience. The maintenance of the Columbus station at its original status, therefore, says the Commission, is a reduction of its coverage without notice and hearing accorded it.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE.

Receipt is acknowledged of a copy of the foregoing brief this 30th day of October, 1940.

FEDERAL COMMUNICATIONS COMMISSION,

By _____
General Counsel.

NOV 13 1940
Joseph M. Plotkin
CLERK
No. 7657

**In the United States Court of Appeals
for the District of Columbia**

SCRIPPS-HOWARD RADIO, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

**BRIEF IN SUPPORT OF APPELLEE'S OPPOSITION TO PETITION
FOR STAY**

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v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BRIEF IN SUPPORT OF APPELLEE'S OPPOSITION TO PETITION FOR STAY

PRELIMINARY STATEMENT

Appellant, the licensee of Station WCPO, Cincinnati, Ohio, has filed two separate appeals from action of the Commission authorizing Station WCOL, located at Columbus, Ohio, to change its frequency and to increase its power. The first appeal, No. 7657, filed April 11, 1940, is from the grant of the construction permit to Station WCOL and the second, No. 7723, filed July 24, 1940, is from the grant of the license to cover the construction permit. Appellant filed a petition for stay on April 11, 1940, and a supplement thereto on May 21, 1940. The Commission on April 22, 1940, and May 23, 1940, respectively, filed its oppositions to this petition and to the supplement thereto. This brief is filed pursuant to the order of this Court of October 18, 1940.

STATEMENT OF FACTS

On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., licensee of WCOL, a local station at Columbus, Ohio, for a construction permit authoriz-

ing it to install the necessary equipment to change its frequency from 1210 kilocycles to 1200 kilocycles and to increase its power from 100 watts to 250 watts.

Appellant is the licensee of WCPO, a local station located at Cincinnati, Ohio, which operates on 1200 kilocycles, with 250 watts power. On October 24, 1939, the Commission granted a motion of appellant, filed October 11, 1939, requesting the Commission to suspend the effectiveness of its action granting the application of Station WCOL pending the filing of, and Commission action upon, a proposed petition for hearing or rehearing to be filed by appellant.

On October 30, 1939, appellant filed with the Commission its petition for hearing or rehearing of the Commission's action granting the application of WCOL. It alleged that "real, substantial, and destructive interference throughout a large portion of the present coverage area of WCPO" would result from WCOL's proposed operation as authorized by the Commission. WCOL, the applicant, filed an opposition to appellant's petition for hearing or rehearing, and at the same time, it also filed a "Study of Interference Conditions," prepared and sworn to by a firm of radio engineers, which contained engineering data concerning the electrical interference which would be caused to appellant's station by WCOL's proposed operation as well as engineering data concerning the increased service which would result from the grant of the WCOL application. Appellant filed no pleading refuting or questioning any of the data contained either in WCOL's Opposition or in its Study of Interference Conditions, but, on December 27, 1939, moved to strike the Study on the ground that it was not subject to cross-examination by appellant.

On March 29, 1940, the Commission denied appellant's petition for hearing or rehearing and its motion to strike and on April 2, 1940, issued its opinion stating its reasons therefor. The Commission held that the allegations in appellant's petition "fail to show that the grant of the WCOL application will not serve public interest, convenience or necessity and consequently no cause has been shown why the application should not be granted." The Commission pointed out that the contrary would be true; not only would the

grant of WCOL's application enable it to increase the number of daytime listeners served by it, but, in addition, because of WCOL's removal from the frequency 1210 kilocycles, two other local stations operating on that frequency, WHIZ and WLOK, would also be able to increase their daytime service areas.¹ The Commission determined that the grant of the WCOL application would make possible an increase of 146,400 persons within the interference-free primary daytime service area of Stations WCOL, WHIZ, and WLOK combined, as opposed to a loss of 20,800 persons residing within the WCPO primary daytime service area. "Upon a comparison of the benefits and detriments sustained in the respective communities," the Commission held that "public interest, convenience or necessity will be served by the grant of the application."

The order granting the WCOL application for construction permit became effective on March 29, 1940, the date on which the petition for hearing or rehearing was denied. The construction permit, dated March 29, 1940, was mailed to WCOL on April 12, 1940.²

No request was made by appellant to the Commission for a further stay of the grant to WCOL pending an appeal,³ but

¹ Station WHIZ is located at Zanesville, Ohio, and operates on 1210 kilocycles. Station WLOK, located at Lima, Ohio, also operates on 1210 kilocycles. On the same date that the WCOL application for construction permit was granted, the Commission also granted the application of WHIZ for a construction permit to increase its power from 100 to 250 watts, contingent upon WCOL changing its frequency from 1210 to 1200 kilocycles. The application of Station WLOK for increase in hours of operation from daytime only to unlimited time and for increase in power from 100 watts to 250 watts has also been granted. The increase in hours of operation was authorized on January 4, 1940, and the increase in power on August 28, 1940.

² It is the Commission's usual practice to date construction permits as of the same date as the effective date of the order granting the application therefor. They are generally mailed out within two weeks of such effective date without further action by the Commission, this being the period ordinarily consumed in the routine clerical tasks of preparation, recordation and obtaining the necessary official initials and signatures.

³ Action on appellant's petition for hearing or rehearing automatically terminated the stay previously granted by the Commission.

on April 11, 1940, appellant filed in this Court in Cause No. 7657 its Notice of Appeal and Statement of Reasons, and also a Petition for Stay Order. In the Petition for Stay Order, appellant alleges that the proposed operation of WCOL would result in destructive interference to the service of Station WCPO, would deprive a substantial portion of the listening public of the only local and regional non-network radiobroadcasting service available to them, and that the operation of WCOL as proposed would substantially and adversely affect public interest, convenience and necessity. Appellant also alleges that WCOL will not suffer any injury if the stay order is granted. The relief requested in the Petition for Stay Order is "that the court issue its order to the Commission suspending the effectiveness of its actions of October 10, 1939, March 29, 1940, and April 2, 1940, granting to WCOL, Inc., the authority complained of, pending the determination of the present appeal." The Commission filed its Opposition to Petition for Stay Order on April 22, 1940. No action has been taken by the Court upon the Petition.

On May 18, 1940, WCOL, having completed construction of the changes authorized by its construction permit, applied to the Commission for a station license in accordance with Section 319 (b) of the Communications Act. Again, appellant failed to make any request upon the Commission to stay its action. But, on May 21, 1940, appellant filed in Cause No. 7657, a Supplement to its Petition for Stay praying that the terms of the order requested in its original petition be enlarged so that "the appellee will be prevented from issuing to WCOL, Inc., any authorization, construction permit, license or other document whatsoever" authorizing WCOL to operate on the frequency 1200 kilocycles with 250 watts power. The Commission filed its Opposition to Appellant's Supplement to Petition for Stay on May 23, 1940. No action has been taken by the Court upon this Petition.

On June 3, 1940, the Commission granted the application of WCOL for a station license. The license, dated June 3, 1940, was mailed to the applicant June 20, 1940. Station WCOL

has been in regular operation as authorized by its license since that date.

On June 22, 1940, appellant filed with the Commission its petition for hearing or rehearing of the Commission's action in issuing the license to WCOL. In this petition appellant incorporated by reference the allegations contained in its first petition for hearing or rehearing and in its Notice of Appeal and Statement of Reasons in Cause No. 7657. It also alleged that actual operation of WCOL as authorized by the license produced the amount of interference to appellant's station which had been set forth in its previous petition for hearing or rehearing.

The Commission on July 19, 1940, issued its opinion and order denying appellant's petition for hearing or rehearing. The Commission referred to its decision of April 2, 1940, in which it had determined that appellant's station would lose only 20,800 listeners as a result of WCOL's proposed operation as against an increase of 146,400 persons within the interference-free primary service areas of Stations WCOL, WLOK, and WHIZ. The Commission pointed out that appellant had failed to set forth any facts indicating that the Commission's conclusions of April 2, 1940, were in error. The Commission further pointed out that appellant did not allege that WCOL had failed to meet the terms, conditions, and obligations set forth in the application or construction permit, or that any cause or circumstance had arisen since the granting of the WCOL construction permit which would make the operation of such station against the public interest, convenience or necessity.

On July 24, 1940, appellant filed its appeal (No. 7723) from the grant of the station license. The two cases were consolidated by order of this Court dated August 24, 1940.

QUESTIONS PRESENTED

(A) Whether this Court has the power to grant relief of the nature requested by appellant; (B) Assuming the Court has the power in a proper case to grant such relief, whether sufficient reason appears therefor.

ARGUMENT

A. This Court has no power to grant relief of the nature requested by appellant**1. The Communications Act of 1934 confers no such power**

Section 402 of the Communications Act of 1934 provides for review of action of the Commission. Section 402 (a) confers jurisdiction in certain cases upon three-judge district courts in accordance with the provisions of the Urgent Deficiencies Act (38 Stat. 219); Section 402 (b) confers jurisdiction on this Court in certain cases in accordance with the provisions of Sections 402 (b)–402 (f). Nowhere in the Communications Act is there any provision which expressly, or by necessary implication, confers upon this Court the power to stay, during the pendency of an appeal taken under section 402 (b), the action of the Commission upon which the appeal is predicated. Three-judge courts, on the other hand, are expressly given the power to issue stay orders and detailed safeguards are established to govern their issuance.¹ In view of

¹ The relevant portions of the statute read as follows (38 Stat. 220):

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application, two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order on injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by ref-

the provision for stay orders incorporated by reference in Section 402 (a) and in view of the particularity with which Sections 402 (b)—402 (f) define the nature and scope of this Court's jurisdiction, the omission by Congress of a provision conferring a power to issue stay orders evinces a Congressional design not to grant such a power to this Court.

The legislative history of Section 402 shows that Congress did not intend this Court to have the power to issue stay orders pending determination of an appeal. Section 16 (f) of H. R. 7716, 72nd Congress, one of the bills designed to amend the Radio Act of 1927, provided as follows:

The Court may * * * upon notice to the Commission and to all other parties to the appeal, after hearing and for good cause shown, enter an order staying action of the Commission under the order appealed from, in whole or in part, upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions as the Court may deem proper. Pending a hearing upon the application for stay, the Court may enter a temporary stay for a period of not to exceed fifteen days.

This bill passed both houses of Congress but was pocket-vetoed. The omission of any such provision in the Communications Act when adopted a year later is clear proof that Congress did not intend to confer this power on the Court. If Congress had intended this Court to exercise such an important power, surely it would not have remained silent when just the year before it attempted to write into the statute a specific provision conferring such power, with elaborate safeguards governing its exercise. This inference is further strengthened by the fact that in other statutes establishing a special proceeding for the review of administrative action, Congress has

erence thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application."

specifically authorized the reviewing Courts to issue stay orders pending determination of the appeal.⁵

Appellant contends that when Congress reenacted without substantial change Section 16 of the Radio Act of 1927 as Section 402 (b) of the Communications Act, it presumptively approved the exercise by this Court of the power to issue stay orders. There is no basis, however, on which to erect the presumption because in none of the cases to which appellant refers does the opinion purport to construe the language of Section 16 or even discuss the question whether the Court possesses the power to issue stay orders. In some of these cases the Court did issue a stay order but the opinions merely made passing reference to the fact that a stay order had been granted.

Moreover, most of the cases which appellant cites arose under Section 16 of the Radio Act of 1927 before its amendment in 1930, under which this Court exercised not judicial power but that of a superior revising agency. In other words, the power exercised by this Court under the original Section 16 of the Radio Act of 1927 was of the same kind as that re-

⁵ E. g. National Labor Relations Act, 29 U. S. C. § 160 (e) ff.; Securities Act of 1933, 15 U. S. C. § 77 (i); Natural Gas Act, 15 U. S. C. § 717 (r); Bituminous Coal Act of 1937, 15 U. S. C. § 836 (b); Federal Power Act, 16 U. S. C. § 825 (i); Federal Alcohol Administration Act, 27 U. S. C. § 204 (h); Fair Labor Standards Act, 29 U. S. C. § 210 (b); Civil Aeronautics Act of 1938, 49 U. S. C. § 646 (d).

These statutes are of three types. The first kind provides that the taking of an appeal shall operate as a stay unless the court otherwise directs (e. g. Federal Alcohol Administration Act, 27 U. S. C. § 204 (h)); the second type specifically authorizes the court to issue stay orders (e. g. National Labor Relations Act, 29 U. S. C. § 160 (e) ff.); the third type provides that the taking of an appeal shall not operate as a stay unless specifically authorized by the Court (e. g. Natural Gas Act, 15 U. S. C. § 717 (r)).

Appellant argues that these statutes are intended to *limit* the power which the reviewing court already possesses to issue stay orders instead of to confer such power. This argument is unsound for two reasons. It overlooks all but the third of the above types of statutes, completely ignoring the first two types which would be entirely superfluous under appellant's contention. Moreover, appellant's argument leads to the incongruous result that in the absence of a provision like that contained in the third type of statute—the taking of an appeal shall not operate as a stay unless specifically authorized by the Court—a stay would automatically issue upon the filing of an appeal.

posed in the Commission; there is no doubt but that *the Commission* possesses the authority to determine the effective date of its orders. Whether or not the Court correctly construed Section 16 as conferring upon it that portion of the administrative function is irrelevant for present purposes since Section 402 did not reenact the original Section 16 but rather Section 16 as amended in 1930, which removed all administrative functions from this Court. Any action purportedly taken by this Court under the original Section 16, is, therefore, completely irrelevant.

Of the cases cited by appellant construing Section 16 as amended, only one (*Boston Broadcasting Co., Station WLOE v. Federal Radio Commission*, 67 F. (2d) 505) even mentions the fact that a stay order had been granted by the Court. Even in this case, no discussion of the problem is made nor does the opinion purport to construe the language of Section 16 as amended. The Court merely refers to the stay order in the last paragraph of the opinion in an indirect manner by declaring that "the stay order entered in this appeal is dissolved" (p. 507).

No such oblique reference in a solitary opinion can possibly be held to constitute a settled construction by this Court of the pertinent provisions of Section 16 as amended. There is, therefore, no basis for any presumption that Congress approved the construction for which appellant contends. Cf. *United States v. Raynor*, 302 U. S. 540.⁶

⁶In none of the cases cited by appellant which arose under Section 402 of the Communications Act of 1934, were stays granted by this Court over the opposition of the Commission. In cases where stays were granted, the Commission either filed no opposition or expressly consented to the requested stay. The power of this Court to issue a stay was, therefore, not in issue.

In any event, the cases cited by appellant were decided prior to the decision of the Supreme Court in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134. There the Supreme Court held that the relationship between this Court and the Commission is not that of upper and lower court and thus destroyed the basis upon which the previous stay orders had presumably been issued. Indeed, in the only decision by this Court since the *Pottsville* case involving this Court's power to stay action of the Commission, it was held that the Court was without power to grant the relief requested. *Evans v. Federal Communications Commission*, 113 F. (2d) 166.

2. No other statute confers upon this Court the power to issue the stay order requested

Appellant apparently contends that Section 262 of the Judicial Code (36 Stat. 1162) and Section 33 of Title 18 of the District of Columbia Code (31 Stat. 1227) give this Court power to issue the stay order requested.

Section 262 of the Judicial Code (36 Stat. 1162) provides:

The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 33 of Title 18 of the District of Columbia Code (31 Stat. 1227) provides:

The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

These statutes, if applicable at all to appeals under Section 402 (b) of the Communications Act, must be read in the light of the nature of this Court's functions in reviewing action of the Commission. As has been pointed out by the Supreme Court in *Federal Communications Commisison v. Pottsville Broadcasting Co.* 309 U. S. 134, the relationship between this Court and the Commission is not a relationship of federal courts *inter se*. The jurisdiction of the Court is limited to laying bare any errors of law committed by the Commission. As applied to proceedings to review Commission action, these statutes give the Court the power to issue only such writs as are necessary to protect the jurisdiction of this Court to carry out its function of laying bare errors of law committed by the Commission.

Appellant does not suggest how this power is in any wise affected by the fact that during the pendency of the appeal the changes in WCOL's equipment authorized by the Commission may be completed and WCOL may commence operation under its new assignment. As a matter of fact, the changes have already been made and for many months now

Station WCOL has been operating on 1200 kilocycles and with increased power. It can hardly be suggested that as a result thereof this appeal is now meaningless. This Court can fully exercise its jurisdiction to review the Commission's action in granting the application of WCOL whether or not the action of the Commission is stayed in the interim. Likewise, the judgment of the Court affirming or reversing the Commission's action can be carried into effect even though WCOL is already operating pursuant to the order under attack.

B. Assuming that this Court has power in a proper case to grant the relief requested, no sufficient reason appears for the grant of such relief in this case

1. Appellant has not shown good cause for the granting of such relief

Assuming *arguendo* that this Court has the power in a proper case to grant relief of the nature requested by appellant's petition for stay, the power should not be exercised unless there is a proper showing made of the necessity therefor. The relief requested is in the nature of an injunction *pendente lite* and is, therefore, subject to the equitable principles governing the granting of such relief.

Appellant has failed to allege any facts or reasons why the relief requested should be granted. The gravamen of appellant's complaint is that the Commission's action will, unless stayed by this Court, cause "irreparable injury" both to appellant and to the listening public. It is alleged that such "injury" will be caused to appellant by eliminating a substantial portion of its service area and by terminating its service to a substantial portion of the established listeners of the station; and to the listening public by depriving a substantial portion of such public of the only local and regional non-network radiobroadcast service available to them.

(a) It is difficult to see how appellant can predicate its claim to relief upon the alleged threatened injury to the public. The Commission is charged with the duty of protecting the public interest. For this Court to reverse the Commission's determination of public interest pending final decision on the ground that the Commission has committed a wrong to

the public is to indulge the presumption, contrary to well established principles of law, that the Commission has committed error.

Furthermore, for the Court to grant the relief requested by appellant amounts to the Court ordering by preliminary injunction that which it cannot do on final disposition of the appeal. After a final decision by the Court that the Commission has committed an error of law, the case is remanded to the Commission for an administrative determination on public interest. The Commission, however, makes such determination and not the Court. For the Court to reverse the action of the Commission pending final action on the ground that the public has been wronged amounts to the Court itself making the administrative determination expressly left to the Commission by Congress. *Cf. Federal Communications Commission v. Pottsville Broadcasting Co., supra.*

(b) Appellant's claim to relief on the ground of "irreparable injury" to itself is likewise without merit. It is based upon a claim of threatened loss of a portion of appellant's service area. Such loss, however, does not constitute an invasion of any right of appellant and hence does not constitute a legal injury. No right is conferred upon appellant as a licensee, either by the statute or under its license, to serve any given area or any particular group of listeners. The rights conferred by a license are to locate radio transmitting equipment in a designated locality and to operate such equipment on a particular frequency during certain hours of the day, using a specified amount of power. The statute expressly declares that no other rights are granted by the license. It is provided in Section 309 (b) that the license shall not vest in the licensee any right in the use of the frequencies designated in the license nor any right to operate the equipment beyond the term of the license nor in any other manner than authorized therein. Appellant fails to show wherein any of the rights conferred under its license are affected by the Commission's action.

Aside from the existence or nonexistence of irreparable "injury" in the legal sense, appellant has failed to allege any facts showing that it will suffer any *damage* whatever if the

Commission's grant remains effective during this appeal. Appellant merely alleges in general terms that a substantial reduction of its service area will result if the Commission's action is not stayed. The Commission concedes—the Commission's opinion of April 2, 1940, so found—that appellant's station will lose 20,800 potential listeners as a result of interference from WCOL and appellant has never suggested that it would lose more. But the loss of these 20,800 potential listeners, in and of itself, is not irreparable damage or loss. There must at least be some showing of loss of revenues.

Appellant's Petition for Stay does not even allege that the loss of listeners will adversely affect appellant's revenues and its Notice of Appeal simply makes a bald assertion that there will be a reduction of revenues without setting forth any facts to support it. Appellant, in its brief, asserts that it is not required to set forth "the *exact* advertising which the appellant would lose and the *exact* amount of financial injury which it would suffer through the effectuation of the Commission's decision" (p. 13). All that this self-serving declaration by appellant does is to seek to hide the fact that appellant has nowhere alleged that it would lose a single dollar's worth of advertising revenues. Indeed, it is hard to imagine how advertising rates and the number of advertisers can be affected by the loss of but 20,800 out of almost a million listeners served by appellant. But even if such a result could be imagined, it would not justify the issuance of a preliminary injunction. For such relief "the injury must be real, not imaginary." *Red Star Yeast & Products Co. v. LaBudde*, 83 F. (2d) 394, 396.

The conclusion is inescapable that the reason why appellant has not alleged any facts to support the general allegation of the danger of immediate and irreparable injury to itself is that in fact no such danger exists. The action of the Commission which appellant seeks to stay has been in effect since March 29, 1940—a period which, but for the intervention of the summer recess, would have been long enough for the disposition of the appeal on the merits—and yet appellant seems to have suffered no ill effects. Quite the contrary, as late as August 20, 1940, and September 3, 1940, appellant in veri-

fied statements to the Commission indicated a confidence that the operation of WCPO would be sufficiently profitable in the future to help finance the operation of a new station in Houston, Texas, for which appellant was seeking a construction permit (File No. B3-P-2962).

Even if it were possible to assume—upon the basis of appellant's bald assertion that it would lose some revenue—that damage would in fact ensue to it unless this Court acted to protect appellant, the Court should consider the adverse effect of a stay order upon the public before granting the relief requested. "The extent to which a court of equity may grant or withhold its aid * * * may be affected by the public interest involved." *United States v. Morgan*, 307 U. S. 183, 194. "The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant." *Petroleum Exploration, Inc., v. Public Service Commission*, 304 U. S. 209, 222-223. The "public interest" and "the weight of convenience" are clearly with Stations WCOL, WHIZ, and WLOK, and the 146,400 listeners who are at this moment receiving additional service as a result of the Commission's action in granting the WCOL application.

Neither before the Commission nor before this Court has appellant denied the accuracy of the figures contained in the Commission's opinion of April 2, 1940, as to the respective gains and losses in service resulting from the WCOL grant. The Commission concluded that 146,400 persons would gain service as a result of the grant to WCOL, as against a loss to appellant of 20,800. Because of the remote possibility that appellant's revenues may in some way—not yet revealed to the Commission or the Court—be decreased, appellant is asking this Court to deprive these 146,400 persons of the service which they are now receiving. All considerations of equity and good conscience require that appellant's alleged self-interest bow to that of the public.

2. There is an absence of indispensable parties

It is clear that appellant's sole purpose in seeking the stay order is to restrain the *operation* of WCOL on 1200 kilocycles with 250 watts power in order to prevent alleged damage to it. Appellant apparently concedes (brief, p. 15) that this relief cannot be granted unless the Commission recalls the authorization already issued to WCOL which, in turn, will necessitate the recall or modification of the authorizations issued to WHIZ and WLOK. These stations are not parties to this appeal and are not subject to the jurisdiction of this Court. Certainly, appellant's asserted rights can have no better claim to cognizance by this Court than the rights of WCOL, WHIZ, and WLOK which will be affected just as much by the outcome of this litigation as will appellant's asserted rights. It is axiomatic that a court cannot take any action affecting the rights of third persons unless such persons are parties to the suit and subject to the jurisdiction of the court. *New Orleans Water Works v. New Orleans*, 164 U. S. 471; *Brady v. Secretary of Interior*, 263 U. S. 435; cf. *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 163.

In the instant case appellant is in the incongruous situation of predicating an appeal to this Court on the contention that it was in effect an indispensable party to a hearing on WCOL's application for construction permit and requesting relief directed against the construction and operation of Stations WCOL, WHIZ, and WLOK, as authorized by the Commission, without those stations being parties to this litigation. Appellant's position is all the more untenable because the Commission, being an administrative agency, is not circumscribed by the doctrine of indispensable parties (Cf. *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350), whereas this Court cannot act in a case directly adjudicating the rights of a person unless such person is a party to the litigation.

3. Appellant has not exhausted its administrative remedies

An appellant has no right to relief from this Court until he has exhausted his administrative remedies. *Red River Broadcasting Co. v. Federal Communications Commission*, 98

F. (2e) 282. Appellant has failed to exhaust its administrative remedies before the Commission.

There can be no doubt that the Commission has the power to determine the effective date of its orders and for good cause shown can suspend the effectiveness of its action. Appellant has had sufficient opportunity to request the Commission to suspend the effectiveness of its action pending determination of the appeal but it has failed to avail itself thereof. Prior to the filing of its petition for rehearing of the grant of the construction permit to WCOL, it had filed a petition for stay pending action upon its proposed petition for rehearing. This stay was granted by the Commission. Action upon its petition for rehearing automatically terminated the stay. Appellant's opportunity to request a further suspension of the Commission's action during the pendency of the appeal has existed at all times since the denial of its first petition for rehearing. It has failed to avail itself of this opportunity. Since appellant thus failed to exhaust its administrative remedies, it cannot ask this Court to do that which it should have sought from the Commission in the first instance.

CONCLUSION

The weakness of appellant's case is revealed by its vacillation in stating the relief it seeks. In its original Petition for Stay it asked for the suspension of the effectiveness of the Commission's order granting the construction permit. In its Supplement, it merely requested the Court to issue an order preventing the Commission from issuing any authorization to Station WCOL which would permit its operation on the frequency 1200 kilocycles. Such action having been taken by the Commission, appellant now urges (brief, p. 2) that it is seeking "an order staying the effectiveness of the Commission's authorization pending the disposition of this appeal." But further on in its brief (p. 15) appellant shows what it is really seeking—an interim decision reversing the Commission and an order specifically requiring "the Commission to recall the construction permit" already issued to WCOL. Appellant is thus asking the Court to disregard the *Pottsville* case and to direct this Commission as to what action it should take.

Such action would be neither within the power nor the exercise of a sound discretion by this Court.

WHEREFORE, it is respectfully submitted that the relief requested in appellant's Petition for Stay, as supplemented, should be denied.

FEDERAL COMMUNICATIONS COMMISSION.

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ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged of the foregoing "Brief in Support of Appellee's Opposition to Petition for Stay" and a true copy received thereof this 13th day of November 1940.

Attorney for Appellant.